IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A Corporation,
Petitioner,

vs.

FRANK SAN ROMAN AND DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

PETITIONER'S PETITION FOR REHEARING AND FOR STAY OF MANDATE PENDING ITS DETERMINATION.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now Comes Globe Liquor Company, Inc., petitioner, by its duly authorized attorneys, Ben W. Heineman and Joseph D. Block, and presents its petition for a rehearing in these proceedings and for a stay of mandate pending its determination. In support of this petition, the undersigned respectfully show:

This Court, in its opinion rendered on January 5, 1948, failed to review the action of the Circuit Court of Appeals in holding that no part of the Todes deposition had been

read or considered as read in evidence. This issue was left unresolved despite the fact that it was properly preserved for review in this Court (Pet. for Cert. 7-8) and despite the fact that the allowance of the petition for certiorari was unlimited in scope. Under such circumstances, it is established that this Court is under a duty to review the material and substantial questions presented. In *Camp* v. *Gress*, 250 U.S. 308, 318 (1919), this Court, speaking through Mr. Justice Brandeis, said:

> "*Fourth.* [illegible] D. and P. R. Camp contend, however, that the judgment against them should be reversed also on the ground that there was error in the instructions as to the measure of damages. The contention must be examined, as the whole case is here on writ of certiorari and the objection was properly saved. *Latcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267; *Delk* v. *St. Louis & San Francisco R. R. Co.*, 220 U.S. 580, 588."

See also *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555, 567-8 (1931). And as recently as *Blumenthal* v. *United States*, (Oct. Term, 1947, Dkt. Nos. 54-57, decided December 22, 1947), this Court said:

> "We did not limit our grant of certiorari to that question, however, and on the record it is inseparably connected with the other issues, which relate to the admissibility and sufficiency of the evidence. Accordingly we have considered all of petitioners' contentions."

As this Court notes in its opinion, the Circuit Court of Appeals disposed of the case upon the assumption "that no part of the deposition was ever admitted as evidence". That issue is one which this Court is fully as competent to decide as the Circuit Court of Appeals. It involves merely an examination of the printed record. In that determination no questions of local law are involved. And in view

of the limited amount in controversy and the extended litigation that has already been required, the decision of this issue by this Court is necessary in the interests of justice and sound judicial administration.

If upon a consideration of this issue this Court determines that the Circuit Court of Appeals erred in refusing to consider the Todes testimony, the merits of this litigation would then be presented for decision. In such a case it would be wholly appropriate for this Court to remand the proceedings to the Circuit Court of Appeals with a direction to that court to pass upon the merits. If the judgment of the District Court is correct, the petitioner should be granted an opportunity in this manner to sustain that judgment without being compelled to retry the case *de novo*.

Similarly, if this Court should regard the record as ambiguous on the question of whether or not the Todes testimony was admitted in evidence, the remedy that does substantial justice is not an affirmance of the judgment entered by the Circuit Court of Appeals. Rather, the appropriate remedy is a remand to that court with a direction to grant the petitioner's motion under Rule 75(h) to remit the record to the District Court for its certification as to whether the Todes testimony was in fact admitted into evidence (R. 268, Pet. Br. 14, fn. 8). This procedure would also provide the petitioner with an opportunity of sustaining the judgment of the District Court without the expense of a new trial.

A new trial at this stage of the litigation is appropriate only in the event that it be ultimately determined that the Todes testimony was not admitted into evidence or if, upon a consideration of the merits, it be determined that the District Court improperly directed a verdict for the petitioner.

WHEREFORE, for the foregoing reasons, it is respectfully urged that upon rehearing:

1. This Court review the determination of the Circuit Court of Appeals that no part of the Todes deposition had been read or considered as read in evidence and in the event of a determination contrary to that of the Circuit Court of Appeals, remand these proceedings to the Circuit Court of Appeals for a decision upon the merits; *or in the alternative*

2. This Court remand these proceedings to the Circuit Court of Appeals with instructions to grant petitioner's motion to remit the record to the District Court for a certification pursuant to Rule 75(h) as to whether the portions of the Todes deposition relied upon were in evidence and, if the certification be in the affirmative, to pass upon the merits, and

3. A new trial be ordered in the event either that the Todes testimony relied upon be determined not to be in evidence or that the determination of the Circuit Court of Appeals upon the merits be adverse to the contentions of petitioner.

4. The mandate of this Court be stayed pending a determination by this Court of this petition for rehearing.

Respectfully submitted,

/s/ BEN W. HEINEMAN,
/s/ JOSEPH D. BLOCK,
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STATE OF ILLINOIS }
COUNTY OF COOK } ss.

The undersigned, Ben W. Heineman, does hereby certify that he is one of the attorneys for the petitioner herein, that he has read and is familiar with the within and foregoing petition for rehearing and that the same was filed in good faith and not for purposes of delay.

/s/ BEN W. HEINEMAN

Ben W. Heineman